U.S DEPARTMENT OF LABOR
SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: July 11, 1995
CASE NO.: 86-ERA-23

IN THE MATTER OF

JOSEPH J. MACKTAL, JR.,
COMPLAINANT,

v.

BROWN & ROOT, INC.,
RESPONDENT

BEFORE: THE SECRETARY OF LABOR

ORDER

Under a settlement agreed to by the parties, Respondent paid Complainant $35,000 for, among other things, discharge of all claims and dismissal of this case. Numerous issues were raised by the parties concerning the effect and validity of the settlement. After tortuous litigation, *see Macktal v. Secretary of Labor*, 923 F.2d 1150, 1152-53 (5th Cir. 1991), the Secretary, exercising her limited authority regarding settlements, *Macktal* at 1154, refused to enter into the settlement because it included a term which the Secretary found against public policy.[1] She remanded this case to the Administrative Law Judge "for further proceedings consistent with [the Secretary's] order and the ERA." The ALJ recommended dismissal because Complainant failed to comply with his order directing Complainant to repay the $35,000 before proceeding to a hearing. The parties have filed briefs in support of and in opposition to the ALJ's recommendation.

The ALJ engaged in lengthy discussion of the equitable principles of unjust enrichment and restitution in contract law. Order Granting Respondent's Motion to Stay Proceedings at 2-5. He noted that "[w]here one has been unjustly enriched by the receipt of a benefit to which he is not entitled, equity will intervene to restore the benefit to its rightful owner." *Id.* at

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2. The ALJ concluded that "[t]he same principles of equity and justice which require Complainant to return Respondent's funds preclude him from proceeding with this action until he does so." *Id.* at 4. Complainant's failure to comply with the ALJ's order to repay the money, the ALJ held, justifies dismissal of this case. The ALJ apparently assumed, without discussion, that the Secretary possesses powers under the ERA comparable to those of a court of equity. *Id.* at 4-6. After careful consideration, I conclude that the Secretary's powers under the ERA are more limited and I will remand this case to the ALJ for a hearing.

Both parties recognized in their briefs that the crucial issue here is whether the Secretary has the authority to order Complainant to return the settlement money. Not surprisingly, each party urges opposing views of the Secretary's powers under the ERA. Complainant points out that administrative agencies are creatures of statute and may not take any action not authorized by or in violation of statutory mandate.[2] Certainly, no explicit language in the ERA authorizes the order entered by the ALJ. But Respondent argues, with some support, that agencies have considerable latitude in interpreting and applying statutes they administer.

I find that, in the absence of a broad delegation of rulemaking authority, neither an ALJ nor the Secretary has the power to enter such an order.[3] *See Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973) ("[w]here the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' [Section 105 of the Truth in Lending Act, 15 U.S.C. § 1604 (1988)] we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purpose of the enabling legislation.'") (footnote and citations omitted); *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (when statute is silent or ambiguous [42 U.S.C. § 7502(b)(6)], courts should defer to agency's interpretation if it is a "permissible construction of the statute.")

Lower courts have upheld agency regulations not explicitly authorized by statute but based on a broad grant of rulemaking authority in a number of situations, including the following:

* where "they facilitate, in a reasonable manner, its effective implementation," *Alexander v. Trustees of Boston Univ.*, 766 F.2d 630, 639 (1st Cir. 1985) (upholding

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regluation, issued under 50 U.S.C. app. § 462(f)(4), requiring educational institutions to ask applicants for financial aid if they have registered for draft as reasonable implementation of statute denying aid to those required to

register who had not done so);

* *Oceanair of Florida, Inc. v. U.S. Dep't of Transp.*, 876 F.2d 1560, 1565 (11th Cir. 1989) (upholding regulatory presumption, established under 49 U.S.C. app. § 1354(a), of unfitness of dormant air carrier where agency has concluded rule "is necessary to perform its statutorily-mandated regulatory responsibilities unless Congress has explicitly [restricted its authority]," (paraphrasing *United States v. Storer Broadcasting, Co.*, 351 U.S. 192, 203 (1956));

* *Touche Ross & Co. v. SEC*, 609 F.2d 570, 579 (2d Cir. 1979) (upholding SEC regulations, issued under 15 U.S.C. § 78(w)(a)(1), establishing procedures for disciplining and disbarring accountants and attorneys form practicing before SEC where regulation is "legitimate reasonable and direct adjunct to the [agency's] explicit statutory power"] (quoting *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 655 (1978), internal quotes omitted);

* *Dir., Office of Wkrs. Comp. Prog. v. National Mines Corp.*, 554 F.2d 1267, 1275 (4th Cir. 1977) (upholding regulation, issued under 30 U.S.C. § 936(a), appointing hearing officers who were not administrative law judges to try black lung claims where regulation "is reasonably related to" purposes of the enabling legislation).

A broad grant of rulemaking power has been described as "a kind of necessary and proper clause [which] grants considerable powers to enforce the substantive mandates of federal law . . . but is tied to and limited by those provisions." *Central Forwarding, Inc. v. I.C.C.*, 698 F.2d 1266, 1277 (5th Cir. 1983). The Fifth Circuit held in *Central Forwarding* that the "enormous powers" granted by Congress to the I.C.C. to regulate the interstate transportation industry, 49 U.S.C. § 10321(a), did not include authority to regulate compensation paid by carriers to owner-operators. *Id.* at 1281.

Congress has not granted broad rulemaking authority to the Secretary under the ERA. Any rule or order issued by the Secretary under the Act, therefore, must be directly related to a specific provision of the statute and clearly necessary to implement express statutory terms. For example, the Secretary has interpreted the 30 day time limit for filing a complaint

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under the ERA, 42 U.S.C. § 5851(b)(1),[4] as a statute of limitations subject to waiver, estoppel and equitable tolling, rather than a jurisdictional requirement. *See, e.g., Doyle v. Alabama Power Co., Case No., 87-ERA-43,* Sec. Dec. Sep. 29, 1989, slip op. at 2; *Bonanno v. Northeast Nuclear Energy Co.,* Case Nos. 92-ERA-40 and 41, Sec. Dec. Aug. 25, 1993, slip op. at 7; *Lastre v. Veterans Administration Lakeside Medical Center,* Case No. 87-ERA-42, Sec. Dec. Mar. 31, 1988, slip op. at 3; *cf., School District of the City of Allentown v. Marshall,* 657 F.2d 16, 19 (3d Cir. 1981) (affirming

Secretary's interpretation of 30 day time limit in Toxic Substances Control Act). Even in this example, where the Secretary was required to interpret a specific statutory term in order to implement the whistleblower laws, the Third Circuit narrowly circumscribed the Secretary's authority, holding that "restrictions on equitable tolling . . . must be scrupulously observed." *Id.* at 19; *see* discussion *id.* at 20-21.

I find no authority in the ERA for me to rectify inequitable bargains or order restitution of monies unfairly retained simply because the parties' dispute concerns, among other things, the whistleblower provision of the ERA.[5] To begin with, no agreement cognizable under the Act settling Complainant's ERA claim has ever been reached because the Secretary never approved it. 42 U.S.C. § 5851(b)(2)(A) (proceeding may be terminated "on the basis of a settlement *entered into by the Secretary* and the person alleged to have committed [the] violation . . . [with the] participation and consent of the complainant;" *Macktal v. Secretary of Labor,* 923 F.2d at 1153-54 (emphasis added) (statutory language only authorizes three options, one of which is a "consensual agreement involving all three parties" and there is no exception for cases in which the complainant and the respondent reach an independent settlement).

In addition, the settlement agreement here released Respondent from any claims by Complainant arising out of his employment with Respondent, his termination from employment in January 1986 and his resignation from his position with Respondent, no just his claim under the ERA. Settlement Agreement ¶ 2; General Release pp. 1-2. The parties have an active dispute pending before me under the ERA which I must resolve as provided in the Act. I have no power to resolve their dispute over an alleged partially performed contract to which I am not a party and which addresses many other matters over which I have no jurisdiction. *Poulos v. Ambassador Fuel Oil Co., Inc.,* Case No. 86-CAA-1, Sec. Ord. Nov. 1, 1987, slip op. at 2.

This case is REMANDED to the ALJ for a hearing.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The Fifth Circuit held that resolution of ERA cases by agreement "is a consensual settlement process involving all three parties," that is, Complainant, Respondent and the Secretary, and that the Secretary may either approve a settlement as written or reject it. *Macktal v. Brown & Root,* 923 F.2d at 1154-55. When Respondent paid Complainant the $35,000, the Secretary had not taken action on the settlement and later disapproved it, as described above.

[2] I note that *FTC v. Eastman Kodak Co.*, 274 U.S. 619 (1927), cited by Complainant as the progenitor of a "long line of cases" restricting administrative agencies to their explicitly granted powers, "has been repudiated." *FTC v. Dean Foods, Inc.*, 384 U.S. 597, 607 n. 4 (1966).

[3] Although the issue here is whether the Secretary has the authority to order repayment of the settlement proceeds in the context of an adjudicatory proceeding, rather than by regulation, the Supreme Court has held that a "unitary agency," one combing policymaking, legislative and adjudicatory powers, may use adjudication to engage in lawmaking and policymaking where it has been delegated powers to make law and policy through rulemaking and necessarily interprets the rules it promulgated. *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 153 (1991)

[4] The 30 day time limit was extended to 180 days by the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 42 U.S.C.A. § 5851(b)(1) (West 1994).

[5] I cannot agree with Respondent's assertion that, absent an express or clearly implied delegation of power by Congress, administrative agencies can routinely exercise equitable powers. In *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 160 (D.C. Cir. 1967), cited by Respondent as authority for that proposition, the court held that the FPC "did not suppose it had a broad equity charter," but only referred to equitable principles to show that "its course was reasonable." In contrast, the overpayment recovery provisions of the Black Lung Benefits Act under consideration in *Napier v. Dir., Off. of Wkrs. Comp. Progs.*, 999 F.2d 1032, 1034 n. 3 (6th Cir. 1993), explicitly provide that "[t]here shall be no adjustment or recovery of an overpayment in any case [where it would] [b]e against equity or good conscience."